*** THE HON'BLE THE ACTING CHIEF JUSTICE BILAL NAZKI**
AND
*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

+ I.T.T.A.No.74 of 2007 & W.P.No.3647 of 2007

%Dated 31.12.2007

W.P.No.3647 of 2007:

Between:

M.S. Raju

…….. PETITIONER

$ The Deputy Commissioner of Income Tax, Central Circle-4, Hyderabad and another.

…… RESPONDENTS

! Counsel for Petitioner : Mr. A.V. Krishna Kaundanya

^ Counsel for Respondents : Mr.J.V.Prasad, S.C. for Income Tax

< GIST:

> HEAD NOTE:

? Cases referred
[1] (1973) 87 ITR 444
2 (1977) 110 ITR 684
3 (1993) 203 ITR 131
4 (1978) 111 ITR (SC) 1
5 (1984) 150 ITR 105
6 (1998) 231 ITR 53)
7 (1998) 230 ITR 385)
8 (2001) 251 ITR 873
9 (2005) 276 ITR 216

THE HON'BLE THE ACTING CHIEF JUSTICE BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

I.T.T.A.No.74 of 2007 & W.P.No.3647 of 2007

ORDER: (**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**)

I.T.T.A.No.74 of 2007 is filed against the order of the Income Tax Appellate Tribunal, Hyderabad in I.T.A.No.1169/Hyd/2004 (assessment year 2001-02) dated 25-05-2006 under Section 260(A) of the Income Tax Act, 1961. W.P.No.3647 of 2007 is filed, by the appellant in the I.T.T.A, aggrieved by the order dated 29-12-2006 passed by the Commissioner of Income-Tax, Hyderabad, under Section 264 of the Income Tax Act, 1961, for the assessment year 2002-03. The appellant in I.T.T.A.No.74 of 2007, who is the petitioner in W.P.No.3647 of 2007, shall hereinafter be referred to as the assessee.

During the previous year relevant to the assessment year 2001-02, the assessee, a film producer, entered into a lease agreement with M/s.Asian Films on 30-12-2000 for releasing a Telugu feature film by name "Devi Putrudu" for a sum of Rs.3.37 crores. The entire amount was received by the assessee before 31-03-2001. However, in his profit and loss account, the assessee

accounted only for Rs.3.07 crores. On being questioned by the assessing officer, the assessee contended that, while the film “Devi Putrudu” was to be released by M/s.Asian Films (Distributors), in the Nizam area on Friday i.e.12-01-2001, the assessee could deliver the prints of the film only on 14-01-2001 and, as a result, the film was released only on Monday i.e. 15-01-2001, that M/s.Asian Films, vide letter dated 13-07-2001 addressed to the Secretary, A.P.Film Chamber of Commerce, sought damages of Rs.44,09,872/-, that the Telangana Telugu Film Distributors Association, vide letter dated 05-10-2001, had informed the assessee that no distributor would come forward to release his forthcoming picture “Manasantha Nuvve” unless the dispute was settled and that the assessee had paid Rs.30 lakhs to M/s.Asian Films through Telangana Telugu Film Distributors Association as is evidenced from the deed of agreement entered into by the assessee with M/s. Suresh Movies Film Distribution for distribution of rights with reference to “Manasantha Nuvve” dated 15-10-2001. The assessee contended that this amount of Rs.30 lakhs was, therefore, not assessable during the relevant previous year.

The assessing officer, however, rejected this contention holding that the entire amount of Rs.3.37 crores, on account of “Devi Putrudu”, was received by the assessee from M/s.Asian Films during the previous year relevant to assessment year 2001-02, that the correspondence furnished by the assessee showed that the liability for compensation arose during the previous year relevant to the assessment year 2002-03, and that no evidence had been furnished by the assessee to show that such compensation had accrued during the previous year relevant to assessment year 2001-02. The assessing officer added this amount of Rs.30 lakhs to the

income returned by the assessee.

Aggrieved thereby, the assessee filed an appeal before the Commissioner of Income Tax (Appeal), wherein he contended that the compensation paid of Rs.30 lakhs was settled by the end of January, 2001 and, as he was maintaining books of accounts on mercantile basis, the assessing officer was not correct in disallowing the same. The Commissioner, on considering the material evidence on record, as also the assessee's letter to the Film Chamber of Commerce dated 06-10-2001, held that it was quite evident that the dispute continued even till 05-10-2001. The Commissioner noted that the agreement dated 05-10-2001, entered into between the assessee and M/s.Suresh Movies Film Distributors, only showed payment of Rs.30 lakhs to M/s.Telangana Telugu Film Distributors Association and not to M/s.Asian Films and there was no recital therein that payment of Rs.30 lakhs was due to the dispute between the assessee and M/s.Asian Films. The Commissioner held that the addition made by the assessing officer was justified.

Aggrieved thereby, the assessee filed an appeal before the Income Tax Appellate Tribunal. Before the Tribunal, the assessee contended that, as per Accounting Standard-4, para-8, the assessee had the right to take into account subsequent events till the balance sheet date i.e. the date on which the financial statements were approved and, as the audit was completed only on 25-10-2001, he was justified in claiming deduction of Rs.30 lakhs. The assessee contended that, even though there was no compensation clause in the agreement dated 13-07-2001, he had made such payment on account of business expediency and, therefore, the same should be

allowed. He alternatively pleaded that if the amount was found not to be allowable during the current assessment year i.e. 2001-02, a direction may be given to allow it in the next assessment year i.e. 2002-03. It was, however, contended on behalf of revenue that the Accounting Standard-4 did not help the case of the assessee, that the auditors report did not contain any note mentioning the specific facts claimed by the assessee, that the evidence furnished by him were subsequent to the date of the balance sheet i.e. 31-03-2001 and that the auditors had not followed Accounting Standard-4. It was further contended that, as the liability did not accrue during the relevant previous year, the same could not be allowed as a deduction. The Tribunal held that whatever evidence had been furnished by the assessee, with reference to the disputed amount, was subsequent to the date of the balance sheet i.e., 31-03-2001, that the dispute relating to compensation amount did not crystallize before 31-03-2001 and, as the liability did not accrue during the relevant previous year, the same could not be allowed as a deduction. The Tribunal found no reason to interfere with the concurrent findings of the assessing officer and the Commissioner on the disputed amount of Rs.30 lakhs. The appeal was dismissed. With regards the alternative plea, that a direction be issued for the subsequent assessment year, the Tribunal held that, the same being not the subject matter of the relevant previous year, no such direction could be issued. Aggrieved thereby, the present appeal.

Sri A.V.Krishna Kaundinya, learned counsel for the assessee, would contend that, since the total receipts of the film “Devi Putrudu” were realized and accounted for during the assessment year 2001-02, the liability arising out of the said receipt was required to be

allowed in the same assessment year as per accounting principles. Reliance is placed by the learned counsel on Accounting Standard-4 issued by the Institute of Chartered Accountants of India to contend that the assessee had the right to take into account events which had happened till the date of approval of the financial statements. It is contended that the Tribunal had failed to see that audit of the accounts was completed only on 25-10-2001 and that the assessee was justified in claiming deduction of Rs.30 lakhs which was paid to M/s.Telangana Telugu Film Distributors Association as compensation.

The Accounting Standards relied on behalf of the assessee are those prescribed by the Institute of Chartered Accountants of India. Thereunder, the definition "events occurring after the balance sheet date" are those significant events, both favourable and unfavourable, that occur between the balance sheet date and the date on which the financial statements are approved by the Board of Directors in the case of a company and by the corresponding approving authority in the case of any other entity. Under Para 8.1 events, which occur between the balance sheet date and the date on which the financial statements are approved, may indicate the need for adjustments to assets and liabilities as at the balance sheet date or may require disclosure. Under Para 8.2, adjustment to assets and liabilities are required for events occurring after the balance sheet date that provide additional information materially affecting the determination of the amounts relating to conditions existing at the balance sheet date.

As has been contended before the Tribunal, on behalf of the revenue, even the audit report does not contain any note mentioning

the specific facts as claimed by the assessee. There is nothing on record before us to indicate that the auditors had followed accounting standard No.4. In such circumstances it is wholly unnecessary for us to examine whether accounting standard No.4 would have required the assessing authority to take note of events which took place after the end of the assessment year in question.

The Tribunal, after extracting the assessee's petition to the Film Chambers of Commerce dated 6.10.2001, held that the assessee had disputed the liability of M/s Asian Films and the Telangana Telugu Film Distributors Association. The Tribunal held that it was clear that the assessee did not recognize the liability during the previous year relating to the assessment year 2001-02 and the dispute, if at all, arose after the closure of the accounting period ending 31.3.2001. The Tribunal observed that the assessee had claimed to have made payment to M/s Asian Films through M/s Suresh Movie Film Distributors only on 15.10.2001, the date relevant to the assessment year 2002-03.

In as much as, even according to the assessee, payment of Rs.30 lakhs was made only on 15.10.2001, much after the assessment year 2001-02 and since no material has been placed to show that the audit report, for the previous year relating to the assessment year 2001-02, has made any reference to such subsequent event of payment of damages, the order of the Tribunal is valid and does not necessitate interference. I.T.T.A.No.74 of 2007 is dismissed.

As noted above, W.P.No.3647 of 2007 was filed to have the order dated 29-12-2006 passed by the Commissioner of Income-Tax, Hyderabad, under Section 264 of the Income Tax Act, 1961 for the assessment year 2002-03, set aside.

For the assessment year 2002-03, the assessee had filed a return of income on 31-10-2002 declaring a total income of Rs.22,09,270/-. He did not claim deduction of Rs.30 lakhs in the said return as, according to him, he had been agitating for the assessment year 2001-02. After giving notices under Sections 143(2) and 142(1), the assessing officer completed the assessment, by his order dated 23-02-2005, determining a total income of Rs.25,11,208/-. The assessee preferred a revision under Section 264 of the Income Tax Act, 1961 before the Commissioner of Income Tax and requested him to direct the assessing officer to allow deduction of Rs.30 lakhs paid by the assessee, as damages, to M/s.Asian Films. The assessee contended before the Commissioner that he had originally claimed this amount in the assessment year

2001-02 and, since the dispute arose by January, 2001, the liability had crystallized by the time the accounts for the assessment year 2001-02 were audited and that the assessing officer had taken the view that it was not allowable deduction since payment was made during the previous year relevant to the assessment year 2002-03. The Commissioner, in his order dated 29-12-2006, rejected the assessee's application for revision holding that the assessment order for the year 2002-03 made no reference to any claim of deduction of Rs.30 lakhs having been made by the petitioner in his profit and loss account, that no such issue arose in the assessment year 2002-03 and that the subject matter of the petition under Section 264 had no bearing on the assessment made for the assessment year 2002-03. Aggrieved thereby, the present writ petition is filed.

Sri A.V.Krishna Kaundinya, Learned Counsel for the assessee, would contend that the Commissioner had refused to exercise jurisdiction merely on a technical ground which had resulted in denial of a genuine deduction available to the assessee, that it was the positive stand of the assessing officer in his order, for the assessment year 2001-02, that the liability for compensation had arisen during the previous year relevant to the assessment year 2002-03 and that the revenue cannot now be permitted to totally deny the relief.

In his return of income filed on 31.10.2002, the assessee did not claim deduction for the amount said to have been paid by him of Rs.30 lakhs and as such the assessing officer had no occasion to examine this claim in the order of assessment dated 23.2.2005. It was for the first time in revision before the Commissioner of Income Tax that the assessee had raised this claim for deduction.

The question which arises for consideration is whether the Commissioner, under Section 264 of the Income Tax Act, is entitled to examine a question raised for the first time before it and which does not form part of the record before the assessing officer or even the order of assessment?

Section 263 of the Income Tax relates to revision of orders prejudicial to revenue and Section 264 to revision of other orders. Section 263(1) and 264 (1) read thus:

263 Revision of orders prejudicial to revenue:

(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation: For the removal of doubts, it is hereby declared that, for the

purposes of this sub-section,

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or section 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.

264 Revision of other orders

(1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

It is also necessary to note that the Explanation to Section 263(1) was substituted by the Finance Act, 1988 with effect from 1.6.1988.

The power of revision, under Section 263 of the Income Tax Act, to call for and examine the records, would arise only if the Commissioner considers that the order of the assessing officer is erroneous and is prejudicial to the interests of revenue. On coming to such a conclusion the Commissioner is empowered to pass orders after giving the assessee an opportunity of being heard and after making or causing an enquiry to be made. Section 264, on the other hand, applies to cases other than those where the

Commissioner considers that the order passed by the assessing officer is prejudicial to the interest of the revenue. In cases where the assessment order is not prejudicial to the interest of revenue, and is considered by the assessee to be prejudicial to his interest, the remedy of revision is only under Section 264 of the Act.

Unlike Section 263(1) which contains an Explanation, and under Clause (b) thereof the word "record" has been defined to include all records relating to any proceedings under the Act available at the time of examination by the Commissioner, Section 264 does not contain any such explanation. The manner in which the word "record" in Section 264 should be considered shall be considered hereinafter. Suffice to note that the judgments of the Madras High Court in **Farm Tea Estates Syndicate v. Agricultural Income Tax Officer, Coonoor**[1], **M.Chetyappan v. Commissioner of Agricultural Income Tax, Madras**[2] and **Viswanathan Silk Centre v. Commissioner of Income Tax**[3], the Supreme Court in **Additional Commissioner of Income Tax, Gujarat v. Gurjargravures P. Ltd**[4], the Kerala High Court in **Parekh Brothers v. Commissioner of Income Tax**[5], all arose prior to substitution of the Explanation to Section 263(1) by the Finance Act, 1988 with effect from 1.6.1988.

Sri A.V.Krishna Kaundinya, learned counsel for the assessee, would also place reliance on the judgment of the Supreme Court in **Commissioner of Income Tax v. Shree Manjunathesware Packing Products and Camphor Works**[6], the Division Bench of this Court in **Commissioner of Income Tax v. K.C.Rangaiah**[7], the Division Bench of the Gujarat High Court in **Ramdev Exports v. Commissioner**[8], and the Calcutta High Court in **Smt.Phool Lata**

Somani v. Commissioner of Income Tax[9].

In **Shree Manjunathesware Packing Products**[6] the question which was referred to the Karnataka High Court was:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the word "record" used in section 263(1) of the Act would not mean the record as it stands at the time of examination by the Commissioner, but it means the record as it stands at the time the order in question was passed by the Income tax Officer"

The Karnataka High Court held that the "record" contemplated by Section 263(1) did not mean only the order of assessment, but comprised of proceedings on which the assessment was based. The question was answered in the affirmative in favour of the assessee and against the revenue and when the matter was carried in appeal, the Supreme Court observed:-

".....It, therefore, cannot be said, as contended by the learned counsel for the respondent, that the correct and settled legal position, with respect to the meaning of the word "record" till 1/06/1988, was that it meant the record which was available to the Income-tax Officer at the time of passing of the assessment order. **Further, we do not think that such a narrow interpretation of the word "record" was justified, in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the Commissioner under Section 263 is of wide amplitude. It enables the Commissioner to call for and examine the record of any proceeding under the Act. It empowers the Commissioner to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the assessing officer is erroneous in so far as it is prejudicial to the interests of the revenue. After examining the record and after making or causing to be made an enquiry if he considers the order to be erroneous then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry he may come in possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the Income-tax Officer when he made the assessment could thus be taken into consideration by the Commissioner after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him. Moreover, in view of the clear words used in Clause (b) of the explanation**

to Section 263 (1), it has to be held that while calling for and examining the record of any proceeding under Section 263 (1) it is and it was open to the Commissioner not only to consider the record of that proceeding but also the record relating to that proceeding available to him at the time of examination…….

……..South India Steel Rolling Mills, Madras v. Commr. of Income-tax, Madras, (1997) 9 SCC 728 the Commissioner in exercise of his power under Section 263 had withdrawn the development rebate granted for the years 1962-63, 1963-64, 1967-68 and 1968-69 on the ground that since the partnership stood dissolved on 3-3-1968 on the death of one of the two partners, before the expiry of eight years the assessee firm was not entitled to the benefit of the development rebate under Section 33 (1) (a) of the Act. The said order passed by the Commissioner was challenged before the Tribunal but the assessee's appeal had failed. At its instance the following question was referred to the Madras High Court :-"whether on the facts and circumstances of the case the revision of assessment under Section 263 by the Commissioner for withdrawing the development rebate granted for Assessment Years 1962-63, 1963-64, 1967-68 and 1968-69 is proper and justified. "the High Court also decided against the assessee. In the appeal filed by the assessee the order of Commissioner was challenged inter alia on the ground that the power under Section 263 could have been invoked on the basis of the record as it stood when the order was passed by the Income-tax Officer and that it was not open to the Commissioner to take into account dissolution of the assessee firm, which took place after passing of the assessment order because that circumstances was not disclosed by the record which was before the Income-tax Officer. **Rejecting this contention this Court held "as regards his taking into consideration an event which had occurred subsequent to the passing of the order by the Income-tax Officer, it may be stated that in Explanation (b) in Section 263 there is an express provision wherein it is prescribed that "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner". The death of one of the two partners resulting in the dissolution of the assessee firm on account of such death took place prior to the passing of the order by the Commissioner and it could, therefore, be taken into consideration by him for the purpose of exercising his powers under Section 263 of the Act. " In that case also the amendment was held applicable to an order passed before 1/06/1988**.

We, therefore, hold that it was open to the Commissioner to take into consideration all the records available at the time of examination by him and thus to consider the Valuation Report submitted by the Departmental Valuation Cell subsequent to the passing of the assessment order and, so the order passed by him was legal. The High Court was wrong in taking a contrary view. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and answer the question referred to the High Court in the negative i. e. in favour of the Revenue

and against the assessee. In view of the facts and circumstances of the case, there shall be no order as to costs. Appeal allowed. ….(emphasis supplied)

In **K.C.Rangaiah**[7]**,** for the assessment year 1980-81 the assessee firm was granted registration under Section 185 of the Income Tax Act. In exercise of his revisional power under Section 263, the Commissioner set aside the order of registration on 12.8.1983. The assessee firm carried the matter in appeal before the Income Tax Appellate Tribunal and the Tribunal took the view that the Commissioner was in error in canceling the Registration. The question which arose before the Division Bench of this Court was whether Section 263 empowered, by amendment of Finance Act 1988 with effect from 1.6.1988, to take into consideration the material which was not available on record at the time of granting registration and it is in this context that the Division Bench observed:-

"…….In **K.a.Ramaswamy Chettiar v. CIT (1996) 220 ITR 657 (Mad)** the assessee had purchased some properties. Without making any enquiries about the value of the properties, the order of assessment was made for the assessment years 1974-75 and 1975-76. It appears that search in the premises of the sellers was conducted and certain documents were recovered from their possession. On the basis of the record the Commissioner of Income Tax exercised jurisdiction under Section 263 of the Act and set aside the assessment. On appeal, the order of the Commissioner was upheld by the Income Tax Appellate Tribunal. **On a reference to the High Court of Madras, one of the questions that was referred related to exercise of power by the Commissioner under Section 263(1), based on material which came to light after the order of assessment. The Division Bench of the Madras High Court has held that clause (b) of the Explanation was inserted in section 263(1), which provides that the word "record" shall include and shall be deemed always to have included all records in relation to any proceeding under the Act available at the time of examination of an order by the Commissioner to revise the same even if the order under revision was passed during the period prior to June 1, 1988, and, therefore, the Commissioner could make use of the materials gathered by him on the date when he assumed jurisdiction under section 263 of the Act**. It held that there was no infirmity in the order of the Tribunal upholding the order of the Commissioner. Here we refer to an earlier judgment

of the Madras High Court in South India Steel Rolling Mills v. CIT (1982) 135 ITR 322 which arose out of an order passed by the Commissioner in exercise of revisional power under section 263(1) canceling development rebate granted by the Income Tax Officer. There, both learned counsel conceded that the Commissioner had jurisdiction to take proceedings in exercise of the revisional power on the basis of the material which was not before the assessing authority. That judgment of the Madras High Court was affirmed by the Supreme Court in South India Steel Rolling Mills v. CIT (1997) 224 ITR 654. Before the Supreme Court one of the contentions urged was that the Commissioner should not have invoked his jurisdiction under section 263 of the Act as the matter could have been dealt with by the Income Tax Officer in exercise of his power of rectifications under Section 155 of the Act. That contention was negatived holding that the revisional power conferred on the Commissioner under section 263 is of wide amplitude and that power cannot be limited with reference to section 155. It was observed as follows (page 662).

"As regards his taking into consideration an event which had occurred subsequent to the passing of the order by the Income Tax Officer, it may be stated that Explanation (b) in section 263 there is an express provision wherein it is prescribed that 'record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner". The death of one of the two partners resulting in the dissolution of the assessee-firm on account of such death took place prior to the passing of the order by the Commissioner and it could, therefore, be taken into consideration by him for the purpose of exercising his powers under section 263 of the Act"

From the above observation of the Supreme Court it has to be now taken settled law that material which came to light, after the order of the Income Tax Officer but before the revisional power was exercised, could be taken into consideration for exercise of revisional power under Section 263(1). …….(emphasis supplied)"

Both the aforesaid judgments related to revision proceeding under Section 263 of the Income Tax Act.

Now the judgments under Section 264 of the Income Tax Act.

In **Ramdev Exports[8],** it was contended on behalf of the assessee, that the assessee had not claimed certain deductions under Section 80 HHC at the time when the returns were filed and as the facts with regards the eligibility of the assessee for the deduction had come to the notice of assessee at a subsequent stage, the respondent ought to have entertained the revision application and should not have rejected the revision application on the ground that the assessing officer had accepted the income of the assessee as

returned. It is in this context that the Division Bench of the Gujarat High Court observed:-

".....Upon perusal of the impugned order, we are of the opinion that the revisional authority did not exercise the jurisdiction vested in it. This court has decided in the case of **C.Parikh and Co. v. CIT** (1980) 122 ITR 610 and in the case of **Digvijay Cement Co. Ltd. v. CIT** (1994) 210 ITR 797 (Guj) that it is open to the revisional authority to look into the deductions, which might be claimed by the assessee even for the first time. **In other words, even if the return as submitted by the assessee is accepted by the Assessing Officer and if thereafter the assessee comes to know about some mistake committed, where either he was eligible for more deduction or had paid more tax, he can definitely approach the revisional authority, and in such an event, it is open to the revisional authority to exercise its jurisdiction under Section 264 of the Act.**

In the instant case, it is very clear that, without going into the merits of the claim made by the assessee in the returns for the assessment years referred to hereinabove, the revisional authority became technical and rejected the revision application merely on the ground that the deductions, which had been claimed before the revisional authority, were not claimed before the Assessing Officer. ....."(emphasis supplied)

In **Smt.Phool Lata**[9]**,** the order declining to entertain the application for revision was passed by the Commissioner, under Section 264, on the ground that, despite being given an opportunity, the assessee had failed to produce the evidence regarding the investment made by him before the assessing officer and, therefore, the discretion under Section 264 need not be exercised in entertaining this application for revision for making an enquiry. Aggrieved thereby, the jurisdiction of the Calcutta High Court was invoked by the assessee. A Single Judge of the Calcutta High Court, while examining the power of revision under Section 264 of the Income Tax Act, observed:

".....**According to me the Commissioner in this case on receipt of the application instead of relying solely on the reports or the records of the case, should have made enquiry considering the documents placed before him by the petitioner. At least this should have been reflected in the impugned order that he had taken note on the date of making application of the revision, of the tax exempting investment. There might be varieties of reasons for not producing evidence at the time of the**

assessment, this does not mean that the assessee is precluded from producing evidence of contemporaneous nature at a later stage by filing an application for revision. The power under section 264 of the Commissioner in my opinion is to do the justice, to prevent miscarriage of justice being rendered. It appears from the records that the petitioner produced unimpeachable documents showing investment which is otherwise liable to be taken note of for granting exemption and if it were allowed by the Commissioner then the petitioner would not have suffered for over-assessment. **The expression 'order prejudicial" means the prejudicial effect of an order passed by the revising officer on the merits**....." (emphasis supplied)

As noted above, under Explanation (b) to Section 263(1), the word "record" shall include and shall always be deemed to have included all the records, relating to any proceedings under the Act, which are available at the time of examination by the Commissioner. The words "shall be deemed always" would signify that, even in cases where the orders of revision were passed prior to the amendment, "records" would include those available at the time of examination by the Commissioner and not merely those records which were available before the assessing authority or those referred to in the order of assessment. It is significant to note that while Parliament has chosen to insert Explanation (b) to Section 263(1), by the Finance Act, 1988 with effect from 1.6.1988, no such Explanation has been inserted to Section 264(1). The omission is significant. Since the power of revision, under Section 263(1), is required to be exercised in cases where it is prejudicial to the interests of revenue, the power of the Commissioner is not limited only to the material which was available before the assessing officer and, in order to protect the interests of revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment. Absence of a similar explanation under Section 264 (1) would

necessitate the conclusion that the records, of any proceedings under the Act which the Commissioner is empowered to call for, are the records of the proceedings before the assessing officer i.e., the material on record before the assessing officer and those reflected in the assessment order including the assessment order itself. The Commissioner, while exercising his powers of revision under Section 264, is not entitled to take into account any material which not placed before the assessing authority or events which took place subsequent to the order of assessment. We must express our inability to agree with the opinion of the Division Bench of the Gujarat High Court, in **Ramdev Exports**[8], since the conscious omission by Parliament to insert a provision in Section 264(1), similar to Explanation (b) of Section 263(1), was not noticed. The opinion of the Learned Single Judge of the Calcutta High Court in **Smt.Phool Lata**[9]**,** does not commend to us. Since the "record" under Section 264(1) is only the record of proceedings before the assessing authority and, as the assessee did not claim any such deduction in the return filed by him before the assessing authority, he is not entitled to raise this question for the first time in revision proceedings under Section 264(1) of the Act.

The order of the Commissioner dated 29.12.2006 does not necessitate interference in proceedings under Article 226 of the Constitution of India. The writ petition fails and is, accordingly, dismissed. However, in the circumstances, with costs.

Date : .12.2007

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BILAL NAZKI, ACJ

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RAMESH RANGANATHAN,J

Note:
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[1] (1973) 87 ITR 444
[2] (1977) 110 ITR 684
[3] (1993) 203 ITR 131
[4] (1978) 111 ITR (SC) 1
[5] (1984) 150 ITR 105
[6] (1998) 231 ITR 53)
[7] (1998) 230 ITR 385)
[8] (2001) 251 ITR 873
[9] (2005) 276 ITR 216